

The opinion in support of the decision being entered today was *not* written for publication in and is *not* binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

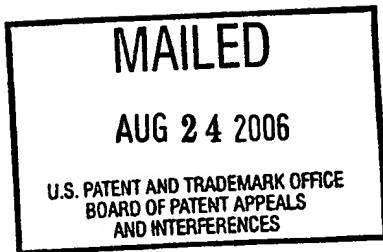
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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* GORDON REX PATERSON DOUGAL

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Appeal No. 2006-2055  
Application No. 09/529,210  
Technology Center 3700

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ON BRIEF

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Decided: August 24, 2006

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Before NAPPI, HORNER, and FETTING, *Administrative Patent Judges*.

FETTING, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. §134 from the examiner's final rejection of claims 1 and 5 to 26, which are all of the claims pending in this application.

We AFFIRM.

## BACKGROUND

The appellant's invention relates to a light radiation therapy system. An understanding of the invention can be derived from a reading of exemplary claim 1, which is reproduced below.

1. An electromagnetic radiation therapy system comprising an electromagnetic radiation emitter configured to emit divergent electromagnetic radiation at a wavelength centered at 1072nm or at a wavelength centered at 1268nm so as to coincide with peak transmissions of a water molecule, the total bandwidth being restricted so as not to exceed the bandpass filter effect characterized by the transmission spectrum of the water molecule between 980nm and 1300nm, the system being capable of producing, at the site being treated, a radiation intensity of at least 50  $\mu\text{Watts/cm}^2$  and up to 2  $\text{Watts/cm}^2$ .

## PRIOR ART

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Grove et al. (Grove)	5,527,350	Jun. 18, 1996
Salansky et al. (Salansky)	6,063,108	May 16, 2000 (Filed January 6, 1997)

Davis, *Lasers and Electro-Optics*, Cambridge University Press, p. 289, 1996

## REJECTIONS

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the above-noted rejections, we make reference to the examiner's answer (mailed March 11, 2005) for the reasoning in support of the rejection, and to appellant's brief (filed August 25, 2004) for the arguments thereagainst.

Claims 1, 6-12, and 15-24 stand rejected under 35 U.S.C. § 102(e) as anticipated by Salansky.

Claims 5, 13 and 14 stand rejected under 35 U.S.C. § 103 as obvious over Salansky.

Claim 26 stands rejected under 35 U.S.C. § 103 as obvious over Salansky in view of Grove.

Claim 25 stands rejected under 35 U.S.C. § 103 as obvious over Salansky in view of Davis.

#### OPINION

In reaching our decision in this appeal, we have given careful consideration to appellant's specification and claims, to the applied prior art references, and to the respective positions articulated by appellant and the examiner. As a consequence of our review, we make the determinations that follow.

**Claims 1, 6-12, and 15-24 rejected under 35 U.S.C. § 102(e) as anticipated by Salansky.**

We note that the appellant argues these claims as a group. Accordingly, we select claim 1 as representative of the group.

The appellant argues that Salansky does not anticipate the wavelengths of claim 1 with sufficient specificity. The appellant further argues that claim 1 is directed to a relatively narrow range centered at 1072 nm or 1268 nm, and Salansky proposes a broad range of 400-2000 nm, and that there are particularly therapeutic effects at the claimed wavelengths not described in Salansky. The appellant concludes that Salansky would not lead a person of ordinary skill in the art to choose the claimed radiation wavelengths. [See Brief at p. 6-7].

The examiner responds that Salanskly also teaches a narrower range of 800-1100 nm in its Table 2 and the bandwidth not exceeding 30-40 nm at col. 16 lines 39-43. [See Answer at p. 4-5]. The examiner concludes that this provides sufficient specificity to anticipate the claimed wavelengths.

The appellant also argues that the claimed wavelengths are critical because they correspond to the peak transmissions of a water molecule. [See Brief at p. 6]. We note that the appellant provides no evidence of a nexus between the peak transmissions of a water molecule and the effects of those wavelengths on therapeutic results. The appellant also argues that the appendix C to the brief provides evidence of unexpected results as to the effectiveness of the claimed wavelengths. [See Brief at p. 7]. We note that the data demonstrating effectiveness in Appendix C, summarized in its Tables 1 & 2, show only the distinction among therapeutic effects of the claimed wavelength of 1072 nm, an unspecified placebo light, and no light, but with application of a cream. Such a comparison cannot demonstrate any advantages of the particular claimed wavelength over any other of the 800-1100 nm range disclosed in Salanskly. We also note that the only comparison of the effects of wavelengths in the appellant's disclosure is between the claimed 1072 nm and 660 nm. [See Specification at p. 13]. Again, this comparison cannot demonstrate any advantages of the particular claimed wavelength over any other of the 800-1100 nm range disclosed in Salanskly, because the alternative wavelength tested according to the specification is outside the range disclosed in Salanskly.

Our reviewing court has held that it is also an elementary principle of patent law that when, as by a recitation of ranges or otherwise, a claim covers several compositions, the claim is "anticipated" if one of them is in the prior art. *Titanium Metals Corp. of America v. Banner*, 778 F.2d 775, 227 USPQ 773 (Fed. Cir. 1985). This same analysis applies equally to ranges of wavelengths as to ranges of compositions. The appellant recites several court opinions that hold that a genus cannot anticipate a species under certain circumstances, viz. either the disclosed genus is so broad it does not place a person of ordinary skill in the art in possession of the claimed species or the claimed species produces unexpected results. [See Brief at p. 3-5]. As we noted above, the appellant has not shown any unexpected results of the claimed wavelength relative to the range disclosed by Salanskly. As to placing a person of ordinary skill in the art in

possession of the claimed invention, we note that although the appellant has claimed a specific wavelength, this is only one of the wavelengths produced by the claimed radiation, i.e. the claimed radiation has a bandwidth that embraces some range of wavelengths. The magnitude of this bandwidth can be appreciated by the appellant's disclosed range of applicable bandwidths as 980-1300 nm. [See Specification at p. 3]. This range is 320 nm wide compared to the 300 nm range disclosed by Salansky. The width of these ranges are comparable to the extent that we cannot say that Salansky has not placed a person of ordinary skill in the art in possession of the claimed radiation band. Therefore we find these arguments by the appellant to be unpersuasive.

Accordingly we sustain the examiner's rejection of claims 1, 6-12, and 15-24 rejected under 35 U.S.C. § 102(e) as anticipated by Salansky.

**Claims 5, 13 and 14 rejected under 35 U.S.C. § 103 as obvious over Salansky.**

The appellant argues that these claims are patentable for the same reasons as claim 1 and we find these argument unpersuasive for the same reasons articulated above. Accordingly we sustain the examiner's rejection of claims 5, 13 and 14 rejected under 35 U.S.C. § 103 as obvious over Salansky.

**Claim 26 rejected under 35 U.S.C. § 103 as obvious over Salansky in view of Grove.**

The appellant argues that this claim is patentable for the same reasons as claim 1 and we find these argument unpersuasive for the same reasons articulated above. Accordingly we sustain the examiner's rejection of claim 26 rejected under 35 U.S.C. § 103 as obvious over Salansky in view of Grove.

**Claim 25 rejected under 35 U.S.C. § 103 as obvious over Salansky in view of Davis.**

The appellant argues that this claim is patentable for the same reasons as claim 1 and we find these argument unpersuasive for the same reasons articulated above. Accordingly we

sustain the examiner's rejection of claim 25 rejected under 35 U.S.C. § 103 as obvious over Salansky in view of Davis.

## CONCLUSION

To summarize,

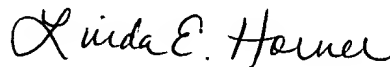
- The rejection of claims 1, 6-12, and 15-24 rejected under 35 U.S.C. § 102(e) as anticipated by Salansky is sustained.
- The rejection of claims 5, 13 and 14 rejected under 35 U.S.C. § 103 as obvious over Salansky is sustained.
- The rejection of claim 26 rejected under 35 U.S.C. § 103 as obvious over Salansky in view of Grove is sustained.
- The rejection of claim 25 rejected under 35 U.S.C. § 103 as obvious over Salansky in view of Davis is sustained.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED



ROBERT E. NAPPI  
Administrative Patent Judge



LINDA E. HORNER  
Administrative Patent Judge



ANTON W. FETTING  
Administrative Patent Judge

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